SUPREME COURT, U. S.
71-1423
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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1971

ERNEST L. GREENE,
Petitioner,

v.

JOHN C. AHERN, *et al,*
as members of the Real Estate
Commission, D.C.,
Respondents.

PETITION FOR CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GEORGE H. WINDSOR
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The opinion of the District of Columbia Court of Appeals is not reported. The Findings of Fact, Conclusions of Law, Judgment, and Order of Revocation of the Real Estate Commission of the District of Columbia are not reported. They are appended.

JURISDICTION

Jurisdiction of this Court is invoked on the following grounds:

(a) The Real Estate Commission of the District of Columbia entered Findings of Fact, Conclusions of Law, and Judgment, and an Order revoking the real estate broker's license of Ernest L. Greene, petitioner herein, on June 29, 1971. (Public Hearing No. 70-3).

On petition to review, the District of Columbia Court of Appeals affirmed the Real Estate Commission of the District of Columbia on January 7, 1972.

(b) The District of Columbia Court of Appeals denied a petition for rehearing on February 1, 1972.

(c) This Court has jurisdiction to review the revocation order of the Real Estate Commission and the decision of the District of Columbia Court of Appeals under 28 U.S.C. Section 1257.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the District of Columbia Code, section 47-1408(g), which authorizes license revocation of a real estate broker for failure to remit or account for funds in his possession belonging to another, violates the due process clause of the fifth amendment where it applies to a failure of a broker who has received a deposit from a contract purchaser of real estate to pay over one-half of the said deposit to the contract seller as liquidated damages under a contract deposit forfeiture provision and the broker contends that the deposit has been returned to the purchaser after rescission of the contract.

II. Whether the District of Columbia Code, Section 47-1409, which authorizes the Real Estate Commission to revoke the license of a broker who fails to remit or account for funds in his possession belonging to another, violates the due process clause of the fifth amendment

where it does not define the evidentiary standards for determination of the operative facts and permits the Commission to find factually that a contract seller and buyer did not rescind a sales contract upon the uncorroborated testimony of the seller where buyer testifies that his deposit was returned pursuant to agreement with the seller.

III. Whether D.C. Code, Section 47-1409, which authorizes the Real Estate Commission to revoke a broker's license for failure to remit or account for funds in his possession belonging to another, violates the due process clause of the fifth amendment where the Commission must find a criminal act and the broker is not entitled to a jury trial and the contract purchaser and contract seller both claim deposit funds held by the broker and the contract purchaser who contends he has properly received payment cannot be made a party to the proceeding.

CONSTITUTIONAL PROVISION AND STATUTES

Fifth Amendment to the U.S. Constitution (in part):

> "not shall any person . . . be deprived of life, liberty, or property without due process of law; . . ."

D.C. Code, 1967, ed. Title 45, Section , Chapter 14, Section 1408, in part:

> The (Real Estate) Commission may, upon its own motion, and shall, upon the verified complaint in writing of any person, provided such complaint or such complaint together with evidence, documentary or otherwise, presented in connection therewith, makes out a *prima facie* case, investigate the conduct of any real estate broker . . . and shall have the power to suspend or to revoke any license issued under the provision of this Chapter, . . . where the licensee, in performing or attempting to perform any of the acts mentioned herein has–
>
> * * * * *

(2) Failed, within a reasonable time, to account for or remit any money, valuable documents, or other property, coming into his possession which belong to others;

Section 45-1409:

The (Real Estate) Commission shall, . . . before suspending or revoking any license, set the matter down for a public hearing. . . The Commission shall have the power to issue subpenas or take testimony of any person by deposition, in the same manner as prescribed by law in judicial procedure in the United States District Court for the District of Columbia in civil cases. It shall also have the power to require the production of books, records, papers, and documents by subpena or otherwise. Any party to any hearing before the Commission shall have the right to the attendance of witnesses in his behalf at such hearing. . . . If the Commission shall determine that any licensee is guilty of a violation of any of the provisions of Sec. 45-1401 to 45-1418 this Chapter, his or its license shall be suspended or revoked.

* * * * *

Section 45-1415:

Where during the term of any license issued by the Commission the licensee shall be convicted in a Court of competent jurisdiction in the District of Columbia or any State (including Federal Courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the Commission, the Commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted.

* * * * *

STATEMENT

In January of 1968 one George Tubies was the owner of a residence at 2400 Afton Street, Hillcrest Heights, Maryland. Tubies had moved to Littlesville, Pennsylvania, and the Afton Street property was vacant. He desired to sell it and gave an exclusive listing to Hertel Realty Company, a Maryland broker. Hertel was unable to obtain a purchaser and Ernest L. Greene, petitioner herein, was made a cooperating broker. Mr. Greene's efforts resulted in a contract for the purchase of the property by one Jackson. This contract was dated January 15-27, 1968, and was never consummated.

Subsequent to April 25, 1968, Hertel's exclusive listing having expired, Tubies, the owner, in May, 1968, authorized Mr. Greene exclusively to sell the Afton Street property. Mr. Greene's efforts resulted in a contract dated May 23-27, 1968 with Vernon K. Wilkerson, for the purchase of the property at a price of $23,700.00 and calling for the payment of $6,700.00 cash and the assumption of an existing first trust note in the amount of approximately $17,000.00. A deposit of $1,000.00 made by Mr. Wilkerson was held by Mr. Greene. The contract contained the following deposit forfeiture provision:

> If the purchaser shall fail to settle, the deposit herein provided for may be forfeited at the option of the seller, in which event the purchaser shall be relieved from further liability hereunder, or without forfeiting the said deposit the seller may avail himself of any legal or equitable rights which he may have under the contract. In the event of the forfeiture of the deposit, the seller shall allow the agent one-half thereof as a compensation for his services to him.

No arrangements were ever made for settlement under this contract. The contract purchaser, Wilkerson, testified at the hearing before the Commission that Tubies verbally repudiated the contract and that he, Wilkerson, acqui-

esced in the repudiation. Greene testified that he returned Wilkerson's entire deposit of $1,000.00 to him.

Tubies later sold the property through another broker for $25,000.00 all cash. Settlement was in September, 1968.

In December, 1968, Tubies complained to the Real Estate Commission, which complaint resulted in a hearing before the Real Estate Commission and the revocation of Mr. Greene's license as a broker.

Upon judicial review the D.C. Court of Appeals affirmed the Commission's revocation order, stating that "the Court is of the opinion that the evidence is sufficient to support the findings and conclusions of the Real Estate Commission which resulted in its decision to revoke Appellant's real estate broker's license on the foregoing charges. . ."

Petitioner, in his brief to the D.C. Court of Appeals, stated (p. 8):

> It is clear that a license to engage in a business is a valuable property right and is protected by the 5th Amendment to the United States Constitution.
> *Silver v. McCamey*, 95 U.S. App. D.C. 318, 221 F.2d 873 (1955).

REASONS FOR GRANTING THE WRIT

1. Section 47-1408(g) of the D.C. Code has necessarily been interpreted to include failure to pay one-half of the purchaser's deposit to a seller as liquidated damages for failure to settle under a real estate contract in the definition of failure to remit or account for money of another coming into the broker's possession.

The acts which are prohibited by section 47-1408(g) insofar as money is concerned and which constitute a basis for suspension or revocation are essentially criminal in nature.

Decisions of this Court have held that in legislation designed to regulate occupations in exercise of state police power there must be a reasonable relationship between the legislative objective and the means of regulation. Requiring licensing in the first place is reasonable. Suspension of a license is punitive in nature and may be a reasonable means of enforcing compliance with statutory standards. Revocation, however, involves exclusion from the occupation, and, as a substantive matter, should be based upon a conclusive determination of unfitness to engage in the occupation and that the licensee should be excluded in the public interest.

Congress, in section 47-1415 has made specific provision for revocation and required that it be predicated upon conviction of a crime in effect involving dishonesty.

The distinction between 47-1415 and 1407(g) is procedural and not substantive.

However, the Commission's finding in respect to Mr. Greene's failure to remit $500.00 to Tubies involves the resolution of a civil dispute merely, i.e., whether Tubies was entitled to $500.00 as civil damages for Wilkerson's alleged breach of contract to purchase Mr. Tubies' property.

Revocation of Mr. Greene's license for conduct for which there could only be civil liability may not constitutionally be included in a definition encompassing essentially criminal conduct.

2. Assuming without conceding that section 1408(g) is substantively adequate, then section 45-1409, under which the Commission acted, is constitutionally deficient in that it does not define the evidentiary standard which the Commission should apply.

The Commission in finding criminal acts which result in exclusion from an occupation should be required to use the standard applicable to criminal cases.

And in a case where the evidence consists of the testimony of a financially interested claimant, the protec-

tion of the interests of the broker require that a revocation order be based only on testimony which is corroborrated.

The D.C. Court of Appeals said only that findings of the Commission were supported by evidence.

Petitioner contends that corroborration is constitutionally required and is not present in this case.

3. Assuming without conceding that the D.C. statutes are constitutionally adequate from a substantive and evidentiary point of view, section 45-1409, which prescribes procedures, is constitutionally deficient in that it does not provide for a jury trial nor any procedure in the nature of interpleader.

The statute permits revocation upon conviction of crimes such as embezzlement, after a regular criminal trial with right to trial by jury.

Where the Commission makes a finding without trial by jury, as the statute appears to permit, under 1408(g) as a basis for revocation, it is acting as if under 45-1409.

Right to trial by jury when accused of a crime such as embezzlement is traditional.

Moreover, where, as here, a person with funds in his possession has competing claims made upon him for those funds, he should have available a procedure whereby he can have both parties before the tribunal as documents in order that they may be properly adjudicated.

Such a procedure was not available to petitioner.

Wherefore, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Court of Appeals.

Respectfully submitted,

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NA-8-2702

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5907 Filed Jan. 7, 1972

Alexander L. Stevas

JANUARY TERM, 1972

ERNEST L. GREENE,
Petitioner,

v.

REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA,
Respondent.

Petition for Review of Decision of Real Estate Commission of the District of Columbia

BEFORE: Hood, Chief Judge, and Pair and Yeagley, Associate Judges.

JUDGMENT

This case came on to be heard on the record from the Real Estate Commission and was briefed and argued by counsel.

Appellant was charged on June 25, 1970, inter alia, with failing within a reasonable time to account for or to remit money coming into his possession which belonged to others, in violation of D.C. Code 1967, § 45-1408(g); with demonstrating such unworthiness or incompetency to act as a licensed real estate broker as to endanger the interests of the public in violation of D.C. Code 1967, § 45-1408(h); and with conduct which constitutes fraudulent or dishonest dealing in violation of D.C. Code 1967, § 45-1408(j). A public hearing on the charges was held on November 3, 1970, and on June 29, 1971 the Real

Estate Commission rendered its decision revoking appellant's real estate broker's license.

After a review of the record and briefs, and upon consideration of oral argument, the court is of the opinion that the evidence is sufficient to support the findings and conclusions of the Real Estate Commission which resulted in its decision to revoke appellant's real estate broker's license on the foregoing charges.

Accordingly, it is this 7th day of January 1972,

ORDERED and ADJUDGED that the decision of the Real Estate Commission of the District of Columbia in this cause be, and it hereby is, affirmed.

PER CURIAM.

FOR THE COURT:

/s/ Alexander L. Stevas,
Clerk.

[Caption omitted in printing]

Filed Feb. 1, 1972

BEFORE: Hood, Chief Judge, and Kelly, Fickling, Kern, Gallagher, Nebeker, Pair, Reilly and Yeagley, Associate Judges.

ORDER

On consideration of petitioner's petition for rehearing en banc and it appearing that no judge of this Court has called for a vote on said petition, it is

ORDERED that petitioner's aforesaid petition is denied.

FOR THE COURT:

/s/ Andrew M. Hood,
Chief Judge

REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF:

Ernest L. Greene :
Respondent : Public Hearing No. 70-3
:

ORDER OF REVOCATION

Upon consideration of the charges preferred herein, of the evidence adduced at the Public Hearing on Nov. 3, 1970, of the Findings of Fact and the Conclusions of Law, and pursuant to the Decision herein made, it is, by the Real Estate Commission of the District of Columbia this 29th day of June, 1971.

ORDERED:

That the license issued by the Commission to Ernest L. Greene to act as a real estate broker be, and the same is, hereby revoked, commencing upon the 16th day following the date of service of a copy of Order of Revocation, on the said Ernest L. Greene.

REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA

/s/ John C. Aheam
Acting Chairman

/s/ [Illegible]
Member

/s/ [Illegible]
Member

/s/ [Illegible]
Member

/s/ [Illegible]
Member

Attest:

William R. Downing
Secretary

[Caption omitted in printing]

Upon consideration of the charges preferred herein of June 25, 1970, of the evidence adduced at the public hearing on Nov. 3, 1970, of the representations, stipulations, arguments of counsel, and of the administrative record, the Real Estate Commission of the District of Columbia makes the following:

FINDINGS OF FACT

1. Ernest L. Greene was licensed as a real estate salesman from July 7, 1956 to February 28, 1962. He was licensed as a real estate broker on April 18, 1962 and has continued so licensed to date, except for a period of ninety (90) days from October 28, 1965 through January 25, 1966, when following a public hearing before this Commission, the broker's license was suspended, and for a period of fifteen (15) days from June 22, 1970 to July 6, 1970, when following a public hearing before this Commission, his broker's license was again suspended.

2. On or about January 15, 1968, Ernest L. Greene, trading as Ernest L. Greene and Company Real Estate (hereafter sometimes referred to as "the respondent"), in cooperation with Hertel Real Estate, a real estate broker licensed in the state of Maryland, did cause to be prepared a contract purchase offer for premises known as 2400 Afton Street (Lot 22 in Block S), Hillcrest Estates, Prince Georges County, Maryland, said premises being then owned by George and Luzie Helene Tubies (hereafter referred to as "the sellers"). The contract recited receipt of a deposit in the amount of $500.00 by the respondent from the purchasers, Joseph A. and Olivia W. Jackson, with a sale price of $23,500.00, and the contract contingent upon the sale of the purchasers' (Jacksons') home at 4809 Clay Street, N.E., Washington, D.C., within fifty days from the acceptance date by the sellers. The contract further recited a sales commission of $700.00, with sixty percent thereof

to be paid to Hertel Real Estate and the remaining forty percent to be paid to the respondent, and the entire deposit of $500.00 to be held by respondent. The contract is dated January 27, 1968 and signed by the respondent on behalf of the purchasers.

3. During March 1968, Mr. David K. Miller, Maryland-licensed real estate salesman for Hertel Real Estate, advised Mr. Tubies that the Jacksons' property had been sold and that the purchasers were prepared to consummate the deal.

4. Settlement was scheduled for April 25, 1968, at 11:00 a.m., at Lyon, Roache and Horan Title Settlements, Inc., 312 Pennsylvania Avenue, S.E., Washington, D.C.

5. The sellers appeared at the aforementioned settlement office at 11:00 a.m., on April 25, 1968, the respondent (Greene) arriving at approximately 11:40 a.m. The respondent then advised the sellers that the purchasers (the Jacksons) would not arrive until after 12:00 noon on the said date, but that the sellers could complete their settlement obligations without the presence of the purchasers. Accordingly, the sellers completed their portion of the settlement and departed.

6. Although the respondent had been in contact with Mr. Jackson several times prior to the scheduled settlement, and had been informed by the said Jackson that he had not been able to come up with the money necessary to complete settlement, the respondent failed to mention this possibility on April 25, 1968 and led all those present to believe that Mr. Jackson would settle later in the day.

7. The said purchasers did not appear at the aforementioned settlement office on April 25, 1968, and did not complete their portion of the settlement at any subsequent time. On or about May 15, 1968, Mr. Tubies contacted Mrs. Bernice Naylor, the settlement officer for the aforementioned settlement office, and was advised

that the said purchasers had neither appeared nor posted the necessary settlement money to consummate the settlement.

8. Mr. Tubies then contacted the respondent and was informed that the deposit would be forfeited and approximately $146 of the $250 due Mr. Tubies would be applied to the mortgage payment for the month of May. The said Tubies agreed to allow the respondent to hold the remainder of the $250 deposit inasmuch as the respondent represented to the seller (Tubies) that he had another contract offer on the property.

9. On or about May 23, 1968, the respondent mailed to the sellers a contract purchase offer dated May 23, 1968, for 2400 Afton Street, and signed by Vernon K. Silkerson as purchaser. The proposed contract recited a sales price in the amount of $23,500.000, with a $1,000.00 deposit received and to be held by the respondent. The contract offer further recited a $500.00 commission payable to respondent, and called for settlement by July 31, 1968.

10. On May 25, 1968, the sellers counter-offered in the amount of $23,700.00, and returned the counter-offer to the respondent. The purchaser (Wilkerson) accepted and ratified the counter-offer.

11. Settlement on the Tubies-Wilkerson contract was never scheduled.

12. On or about August 6, 1968 (and without a written release entered into by and between the sellers and Wilkerson), the respondent mailed to the sellers a new contract offer, with date of August 6, 1968, and bearing the signature of William E. Pegram as purchaser.

13. The sellers rejected the Pegram offer and so advised the respondent. They further declared the deposit on the Wilkerson contract as being forfeited and demanded that the respondent remit in accordance with the contract terms one-half of the said deposit, or $500.00.

14. The respondent has failed to remit this sum of $500.00 to the sellers in accordance with the forfeiture provision of the Wilkerson-Tubies contract.

CONCLUSIONS OF LAW

1. Ernest L. Greene, in violation of Section 45-1408(g), D.C. Code, 1967 ed., failed to account for or remit money coming into his possession which belonged to others in failing to remit $500.00 to the said Tubies following forfeiture of the contract between the said Tubies and Mr. and Mrs. Wilkerson.

2. The aforesaid conduct of Ernest L. Greene is in violation of Section 45-1408(h), D.C. Code, 1967 ed., in that such conduct demonstrates such unworthiness or incompetency to act as a real-estate broker as to endanger the interests of the public.

3. The aforesaid conduct of Ernest L. Greene is in violation of Section 45-1408(j) in that such conduct constitutes fraudulent or dishonest dealing.

DECISION

Based upon the aforesaid Findings of Fact and Conclusions of Law, it is the Decision of the Real Estate Commission that the Real Estate broker's license of Ernest L. Greene shall be revoked.

Given under my hand and seal of the Real Estate Commission on this 29th day of June, 1971, by Order of the Real Estate Commission of the District of Columbia.

/s/ William R. Downing
Secretary
Real Estate Commission